

A AmFinance Bhd v Lebig bt Haji Ali & Ors

B HIGH COURT (MUAR) — ORIGINATING SUMMONS NO
24(L)-106 OF 2004
AHMADI ASNAWI JC
11 JULY 2008

C *Land Law — Charge — Order for sale — Application for — Cause to the contrary — Forged charge — Whether defendants had successfully established existence of cause to the contrary to resist order for sale — Whether plaintiff was bona fide purchaser for valuable consideration — National Land Code s 256(6)*

D *Land Law — Indefeasibility of title and interest — Forged charge — Bona fide purchaser for value — Whether plaintiff was bona fide purchaser in good faith — Whether indefeasibility applied to immediate purchaser — Whether careless or negligent purchaser was purchaser in good faith — National Land Code s 340(3)*

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F The plaintiff bank had granted a loan of RM200,000 to one Gnanavathy d/o Ambiaavagar ('the borrower'). The three defendants who were the registered proprietors of a piece of land in Johor had allegedly executed a third party charge over the land in favour of the plaintiff to secure a loan of RM200,000 of which, the plaintiff admitted, only RM100,000 was disbursed. When the borrower defaulted in repaying the loan the plaintiff commenced this action for an order for sale of the charged property, pursuant to s 256 of the National Land Code ('the NLC'). The defendants denied ever executing the charge document and relied mainly over the issue of forgery to establish cause to the contrary, a defence offered by s 256(3) of the NLC to contest the order for sale. When this part of action was first heard, the parties had agreed that they would be bound by the results of the forensic report ('the report') relating to the thumbprints affixed on the charge documents ie, if the report showed that there was no forgery then the order for sale ought to be granted, but if the report showed that the prints were forged then the plaintiff's order for sale ought to be dismissed. According to the defendants, these terms, which were duly recorded in the court file, became a consent order recorded by the parties. The report which was produced in this trial established beyond doubt that only the third defendant's prints were forged but that the first and second defendant's prints were not. The defendants therefore submitted that the plaintiff was now estopped from going against the consent judgment and praying for an order for sale. However, the plaintiff submitted that it was not a party in the forgery relating to the thumbprints of the third defendant on

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the charge documents and that the forgery was perpetrated by the first and second defendants against the third defendant. The plaintiff therefore contended that it was a bona fide purchaser with valuable consideration with an indefeasible title over the land, having duly registered the charge. In addition, it was the plaintiff's contention that since it acquired the land in good faith for valuable consideration it was protected by s 340(3) of the NLC, despite the forgery on the charge documents. The court had to therefore decide based on the evidence adduced by both parties whether the defendants had successfully established the existence of cause to the contrary to resist the order for sale sought by the plaintiff or if the plaintiff as chargee, was a bona fide purchaser for valuable consideration and therefore ought to be granted the order for sale.

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Held, dismissing the plaintiff's application for an order for sale with cost:

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- (1) Going by the notes of evidence there was no consent order as submitted by the defendants. What could be gathered at most was that the parties agreed to be bound by the findings that the charge documents relating to the third defendant's thumbprints were forged (see paras 8 & 11).
- (2) It is trite law that the plaintiff carried the burden of establishing that it was a bona fide purchaser for value. However, the plaintiff did not make any enquiries as to why the defendants who resided hundreds of miles apart from the borrower and who received no benefit at all from the transaction and who were not related at all with the borrower were willing to charge their land to the plaintiff. Having the duty of proving its bona fide, the plaintiff equally did not inquire as to how the defendants' thumbprints got affixed on the charge documents when the plaintiff was under a duty to monitor and witness the execution of the charge. In the circumstances the events as narrated lend credence to the reasonable inference that the plaintiff was most likely aware of the forgery perpetrated against the defendants and did nothing to prevent the forgery. The factum of the forgery of the third defendant's thumbprint was the final indictment. As such, the bona fide of the plaintiff in the whole transaction was very apparently lacking (see paras 14 & 16).
- (3) The plaintiff appeared to have acted devoid of common sense when it did nothing to verify whether the thumbprints on the charge documents were genuine or were affixed out of their own volition by the defendants. Such gross dereliction of duty, carelessness and negligence does not deserve the protection of the law (see paras 17 & 18).
- (4) It is trite law that the registration of a charge document obtained by way of fraud, forgery or by means of an insufficient or void instrument will

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- A render the interest of the chargee defeasible under s 34(2) of the NLC. In this case, although the prints of the first and second defendants were genuine nevertheless the whole charge document and its registration thereafter was vitiated by the forgery of the third defendant's thumbprints. At the same time there was no duty imposed on the
- B defendants, in particular the third defendant, to prove that the plaintiff was a party or privy to the forgery. Thus in the circumstances, the plaintiff's interest in the land was defeasible by virtue of s 34(2)(b) of the NLC (see paras 16, 19 & 24).
- C (5) As the plaintiff was not a subsequent purchaser but an immediate purchaser of the land, the protection afforded by s 34(3) did not apply. Thus the plaintiff's interest over the land was simply defeasible and thus liable to be set aside (see paras 20, 23 & 24).

D **[Bahasa Malaysia summary]**

- E Plaintiff bank memberikan pinjaman sebanyak RM200,000 kepada Gnanavathy a/p Ambiavagar (peminjam). Ketiga-tiga defendan yang merupakan pemilik berdaftar sebidang tanah di Johor dikatakan telah membuat cagaran pihak ketiga atas tanah tersebut bagi pihak plaintiff bagi tujuan pinjaman RM200,000 yang mana, plaintiff mengakui, hanya RM100,000 dibelanjakan. Apabila peminjam gagal membayar balik pinjaman, plaintiff memulakan tindakan ini bagi suatu perintah jualan hartanah yang dicagarkan, berikutan dengan s 256 Kanun Tanah Negara
- F (KTN). Defendan menafikan membuat cagaran tersebut dan memakai hujah pemalsuan untuk mengukuhkan adanya sebab-sebab sebaliknya, satu pembelaan di bawah s 256(3) KTN bagi mempertikai perintah jualan tersebut. Apabila bahagian ini didengar dahulu, pihak-pihak bersetuju bahawa mereka akan terikat dengan keputusan laporan forensik (laporan
- G tersebut) berkaitan dengan cap jari di borang cagaran tersebut, iaitu jika laporan itu menunjukkan tiada pemalsuan, maka perintah jualan akan diberikan, tetapi jika laporan tersebut menunjukkan cap jari itu dipalsukan, maka permohonan plaintiff untuk perintah jualan akan diketepikan. Menurut defendan-defendan, syarat-syarat ini yang direkodkan dalam fail mahkamah,
- H menjadi perintah persetujuan kepada pihak-pihak yang terlibat. Laporan yang dikemukakan dalam pendengaran ini menunjukkan pembuktian melampaui keraguan bahawa hanya cap jari defendan ketiga yang dipalsukan, cap jari defendan pertama dan kedua tidak dipalsukan. Defendan-defendan kemudiannya menyatakan bahawa plaintiff diestop daripada mengingkari
- I perintah persetujuan sebelum ini. Walau bagaimanapun, plaintiff menyatakan bahawa plaintiff bukanlah pihak-pihak yang terlibat dalam pemalsuan tersebut, malah pemalsuan itu dilakukan oleh defendan pertama dan kedua terhadap defendan ketiga. Plaintiff berhujah bahawa dia merupakan pembeli bona fide dengan balasan berharga terhadap hak milik tak boleh sangkal

tanah tersebut, yang telah dicagarkan. Tambahnya, plaintif menyatakan bahawa memandangkan plaintif mendapatkan tanah tersebut dengan niat suci hati dengan balasan berharga, plaintif dilindungi oleh s 340(3) KTN, meskipun adanya pemalsuan atas dokumentasi cagaran. Oleh itu mahkamah harus memutuskan berdasarkan keterangan yang dikemukakan oleh kedua-dua pihak sama ada defendan-defendan berjaya mewujudkan sebab-sebab sebaliknya untuk menghalang perintah jualan yang dipohon oleh plaintif atau, plaintif, sebagai pemegang gadaian, merupakan pembeli bona fide dengan balasan berharga dan oleh itu, sepatutnya diberikan perintah jualan tersebut.

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Diputuskan, menolak permohonan plaintif untuk suatu perintah jualan dengan kos:

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- (1) Melihat kepada nota-nota keterangan, didapati tiadanya perintah persetujuan seperti yang dinyatakan oleh defendan-defendan. Apa yang boleh dirumuskan ialah pihak-pihak bersetuju akan terikat dengan keputusan bahawa dokumentasi cagaran berkenaan cap jari defendan ketiga dipalsukan (lihat perenggan 8 & 11).
- (2) Sudah menjadi hukum perundangan bahawa beban membuktikan bahawa plaintif merupakan pembeli bona fide dengan balasan berharga terletak dibahu plaintif. Namun, plaintif tidak membuat sebarang siasatan tentang mengapa defendan-defendan yang tinggal berjauhan dengan peminjam dan tidak mendapat apa-apa faedah daripada transaksi tersebut dan langsung tiada pertalian dengan peminjam rela mencagarkan tanah mereka kepada plaintif. Bertanggungjawab membuktikan sifat bona fidanya, plaintif juga tidak menyiasat bagaimana cap jari defendan-defendan tertera pada dokumentasi cagaran tersebut kerana plaintif bertanggungjawab menyelia dan menyaksikan pelaksanaan cagaran tersebut. Melihat kepada keadaan dan kejadian-kejadian yang berlaku, memberikan suatu anggapan yang munasabah bahawa kemungkinan besar, plaintif tahu tentang pemalsuan terhadap defendan-defendan dan tidak berbuat apa-apa untuk menghalangnya. Faktum pemalsuan cap jari defendan ketiga merupakan indikmen terakhir. Oleh itu, sifat bona fide plaintif dalam keseluruhan transaksi ini secara jelas tiada (lihat perenggan 14 & 16)
- (3) Plaintif kelihatan seperti bertindak tidak wajar apabila tidak berbuat apa-apa untuk menentusahkan sama ada cap jari pada dokumentasi cagaran itu adalah asli atau dibuat berdasarkan kerelaan hati defendan-defendan. Pengabaian tanggungjawab dengan serius, dan kecuaiian tidak selayaknya mendapat perlindungan undang-undang (lihat perenggan 17 & 18).

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- A (4) Sudah menjadi hukum perundangan bahawa pendaftaran dokumentasi cagaran yang dibuat secara penipuan, pemalsuan atau secara instrumen yang tidak sempurna atau tidak sah, akan mengakibatkan kepentingan pemegang gadaian menjadi boleh sangkal di bawah s 34(2) KTN. Dalam kes ini, walaupun cap jari defendan pertama dan kedua adalah asli, keseluruhan dokumentasi cagaran dan pendaftarannya menjadi tidak sah akibat daripada pemalsuan cap jari defendan ketiga. Pada masa yang sama, defendan-defendan, terutamanya defendan ketiga tidak bertanggungjawab membuktikan bahawa plaintif terlibat dalam pemalsuan tersebut. Maka, dalam keadaan ini, kepentingan plaintif atas tanah tersebut menjadi boleh sangkal berikutan dengan s 340(2)(b) KTN (lihat perenggan 16, 19 & 24).
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- D (5) Oleh sebab plaintif bukan merupakan pembeli selepas, malah merupakan pembeli langsung tanah tersebut, perlindungan yang diberikan oleh s 340(3) tidak boleh diguna pakai. Maka, kepentingan plaintif terhadap tanah tersebut menjadi boleh sangkal dan boleh diketepikan (lihat perenggan 20, 23 & 24).]

Notes

- E For cases on forged charge, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2921–2922.
For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

Cases referred to

- F *Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals* [2007] 4 MLJ 489 (refd)
Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241 (refd)
- G *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136 (folld)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor 1994] 1 MLJ 294 (refd)
- H *OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511 (refd)
Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors [2005] 6 MLJ 120 (refd)

Legislation referred to

- I National Land Code ss 256, 256(3), 340(1), 340(2), 340(2)(b), 340(3), Form 16D
Rules of the High Court 1980 O 31, O 83 r 1
Syuhaiza Ismail (Azhar & Wong) for the plaintiff/appellant.
SS Tham (Ong and Manecksha) for the defendants/respondents.

Ahmadi Asnawi JC:

[1] The third defendant has passed away before the commencement of this action. The first defendant passed away on 31 August 2005, midway through the action, while the second defendant is now 90 years old.

[2] All three defendants are the registered proprietors of a piece of land held under lot 4934 Geran No 17672, Mukim Benut, Daerah Batu Pahat, Johor. It was alleged that on 5 February 1987, all the three defendants executed a third party charge over the said land in favour of the plaintiff to secure a loan of RM200,000 granted by the plaintiff bank to one Gnanavathy d/o Ambiaavagar, the borrower. the plaintiff admitted that only RM100,000 was disbursed.

[3] On account that the borrower had defaulted in repaying the said loan, the plaintiff commenced this action to enforce the statutory charge by way of an order for sale pursuant to s 256 of the National Land Code ('NLC') and O 31 and O 83 r 1 of the Rules of the High Court 1980 ('RHC').

[4] The defendants denied ever executing the said charge and also relied upon a number of issues but mainly on the issue of forgery to establish cause to the contrary, a defence offered by s 256(3) of the NLC.

[5] Learned counsel for the defendants made a submission that on 6 November 2006, both the parties had agreed, before His Lordship, the then presiding judge, to be bound by the result of the forensic report relating to the thumbprints affixed on the charge documents. In the event the forensic report shows that the thumbprints were forged, the court shall forthwith dismiss the plaintiff's application for order for sale. On the other hand, if the forensic report shows that there is no forgery, the court shall forthwith grant the order for sale.

[6] These terms, upon confirmation by both parties, were duly recorded by His Lordship in the court file. As such, it was submitted, this in effect is a consent order agreed by both parties. Now that the result of the forensic report from Pusat Pendaftaran Penjenayah Malaysia Singapura, Bukit Aman, Kuala Lumpur, is out as shown in exh TSS-4 of encl 84, the parties are now bound by the said report even though the consequence may turn out to be unfavourable to either one of the party.

[7] The forensic report as exhibited in TSS-4 of encl 84 revealed that:

A Cap jari pada dokumen diceraian 1.1. (Ihanik) (which refers to Acknowledgement by charge), 1.2. (Ihanik) (which refers to execution page of charge) and 1.3 (Ihanik) (which refers also to execution page of charge) adalah sama, tetapi tidak sama dengan cap jari pada ceraian 1.4 (which refers to Paspot Terhad Malaysia atas nama Hanik bte Ali, K/P 2324404).

B [8] This findings established beyond doubt that the third defendant's thumbprints were forged. No such dissimilarities were shown in the thumbprints belonging to the first and second defendants.

C [9] It was thus the submission of learned counsel for the defendants that the plaintiff are now estopped from going against the consent judgment as indicated in the preceding paragraphs. Learned counsel for the plaintiff offered no reply to this issue.

D [10] However, the notes of evidence recorded on 6 November 2006 only indicated the following, reproduced in full:

DALAM KAMAR

E Pada 6 November 2006
Encik Mohd Azizi bagi pihak Plaintiff
Encik S.S Tham bagi pihak Defendan
Mohd: Pohon 2 bulan

F Under police investigation.
Tham: On 27.10.2006, Defendant 2 telah kemukakan cop jari kepada polis, allegation of forgery of thumbprint on charge document. Defendan 1 agrees to be bound by findings of police with respect to thumbprint.

G Mohd: I juga setuju
Mah: 6.2.2007 (Bicara)
Sgd.

H Y.A. Dato' Jeffrey Tan

I [11] Going by the notes recorded as reproduced in full above, it seems to me that there is no such consent order as submitted by learned counsel for the defendants. What can be gathered at most is that the parties agreed to be bound by the findings that the charge documents relating to the third defendant's thumbprints were forged.

[12] It was thus the submission of learned counsel for the plaintiff that the plaintiff was not involved and was not a party in the forgery relating to the

thumbprints of the third defendant on the charge documents. It was further submitted that it was most likely that the forgery was perpetrated by the first and second defendants against the third defendant to enable the said land to be charged to the plaintiff. The plaintiff is a bona fide purchaser with valuable consideration and since the said charge was duly registered (vide perserahan No 2706/87 Jilid 1551 Folio 88), s 340(1) of the NLC thus conferred upon them indefeasibility of the said interest against the rest of the world. Notwithstanding the glaring forgery on the said charge documents, the proviso to sub-s (3) of s 340 of the NLC further operates to protect the said interest as the said interest was acquired by them as a purchaser in good faith and for valuable consideration.

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[13] Now, was the plaintiff a bona fide purchaser for valuable consideration? It appears to me that the salient features surrounding the transaction enumerated below suggested otherwise:

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- (i) At the time when the defendants were alleged to have affixed their thumbprints on the charge documents all three were already in their 70s.
- (ii) They were illiterate, could only affix their thumbprints.
- (iii) All three defendants are siblings and not related to the borrower.
- (iv) All three defendants are Malay women whereas the borrower is an Indian (woman).
- (v) No ostensible benefits or advantages were gained by the three defendants over the loan given to the borrower.
- (vi) The borrower resides in Kuala Lumpur, whereas all three defendants reside in Batu Pahat. The said property in issue is also located in Johor.
- (vii) The amount borrowed is huge, amounting to RM200,000.
- (viii) The plaintiff signed the charge documents on the same date all three defendants affixed their thumbprints on the same documents ie 5 February 1987 and the witnesses who witnessed the execution were from Kuala Lumpur. The plaintiff bank is also located in Kuala Lumpur. The documents were executed in Kuala Lumpur, either at the plaintiff's office or their agent's. But all three defendants denied having executed the charge documents. However the plaintiff did not offer any evidence to indicate that they actually met all three defendants in their office in Kuala Lumpur to rebut the defendants' denials of executing the charge documents in Kuala Lumpur. Neither the plaintiff's officer who approved or processed the loan application or the officer who executed the charged documents came forward to depose whether they actually met all the three defendants in person at the material time and explained what actually transpired there or attest that the defendants

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A actually affixed their thumbprints in their presence since all were done on the same day ie 5 February 1987. If all three defendants were present were sufficient explanation given to them of the effect of affixing their thumbprints on the charge documents. Of course it was not their job to do so, but bearing in mind the age and back ground of the chargors and the parties involved in the transaction it is only conscionable to do so. That is what equity is all about.

(ix) The identity of the witness who witnessed the affixing of the thumbprints of the defendants on the acknowledgement by chargor (also affixed on 5 February 1989) and charge documents is not known up to date. Despite the challenged, the plaintiff did not take any step to ascertain the identity of the said witness. Despite the defendants denials, there is no rebuttal by the said witness that the defendants particularly the first and second defendant did infact affixed their thumbprints in his presence. Could the said witness also the plaintiff's agents? If so, it simply means that the plaintiff may have colluded in defrauding the defendants.

[14] It is rather odd that despite the questionable circumstances under which the transaction was transacted in particular the procurement of the defendants thumbprints, the plaintiff proceeded to grant the loan to the borrower and created the charge on the defendants' land. The plaintiff did not make inquiries why the defendants who resided hundreds of miles apart from the borrower and who received no benefit at all from the transaction and not related at all with the borrower were willing to charge their land to the plaintiff. Having the duty of proving its bona fide, the plaintiff in my view, equally did not inquire and failed to inquire as to how their thumbprints got affixed on the charge documents bearing always that the plaintiffs were under a duty to monitor and witness the execution of the charge.

[15] It is for example, pretty comical for the court even to contemplate accepting the entire three defendants' acknowledgement to have read the loan agreement executed between the plaintiff and the borrower and to have declared that they have fully comprehended and accepted the terms and conditions of the said loan and which forms part of the terms of the charge to be executed by them over their land when they were able only to affixed their thumbprints over the said documents as evinced at p 38 of the plaintiff's affidavit in support, encl 3 of their *saman pemula*, encl 2.

[16] The events as narrated above lends credence to the reasonable inference that the plaintiff is not altogether unaware or most likely was aware of the forgery perpetrated against the defendants that was in progress then. The factum of the forgery of the third defendant's thumbprint is the final

indictment. But the plaintiff did nothing to prevent the forgery. It is trite law that the plaintiff carried the burden of establishing that they were bona fide purchaser for value (see *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [2005] 6 MLJ 120 and *Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals* [2007] 4 MLJ 489). Equally there was no duty imposed upon the defendants to prove that the plaintiff was a party or privy to the forgery. In this case, the bona fide of the plaintiff in the whole transaction is very apparently lacking. It is just not there.

[17] Thus, apart from the findings that the plaintiff was aware or most likely was aware of the forgery perpetrated against the third defendant and the two others, the corresponding question fit for determination is whether the plaintiff was careless and negligent in the conduct and affairs of the whole transaction. From the course of events as it unfolded, it seems to me that they were. The plaintiff acted like robots, devoid of common sense in approving the loan by the borrower and accepting the third party charge allegedly furnished by all the three defendants as security for the said loan without question or further enquiry. The law is clear on the notion that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136, at p 156, the Court of Appeal thus ruled that:

[43] Further had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the first defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v Hinton* (1899) Ch D 264, Lindley MR said:

To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgage of her priority would be the greatest injustice

[44] So too here. The first defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.

A [18] The conduct of the plaintiff in this case presently before me is no different. As said earlier the plaintiff acted like robots devoid of common sense, imagination nor intelligence. The plaintiff did nothing to verify whether the thumbprints on the charge documents were genuine or were affixed out of the free will and own volition of the persons who affixed their thumbprints therein. Such gross dereliction of duty, carelessness and negligence does not deserve the protection of the law court at all.

C [19] It is trite that the registration of a charge document obtained by way of fraud, forgery or by means of an insufficient or void instrument will render the interest of the chargee defeasible under s 340(2) of the NLC. Hence, in this case before me, notwithstanding that the thumbprint of the first and second defendant were genuine, nevertheless the whole charge documents and its registration thereafter is vitiated by the forgery of the third defendant's thumbprints. Thus the said interest is defeasible by virtue of s 340(2)(b) of the NLC. In *OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511, the Court of Appeal held that the order for sale should not be granted because the registration of the charge was obtained through forgery. This constitutes cause to the contrary (see also *Subramaniam all NS Dhurai v Sandrakasan Retnasamy & Ors, Abu Bakar Ismail & Anor v Ismail Husin & Ors and other appeal* and *Au Meng Nam & Anor v Ung Yak Chew & Ors*).

F [20] Hence the next issue is whether the plaintiff can rely on the proviso of s 340(3) of the NLC and the ruling in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241, to protect its interest as presently claimed by the plaintiff. In that case it was held that a purchaser in good faith and for valuable consideration obtains immediate indefeasibility of title notwithstanding that the title obtained was acquired under a forged instrument.

G Section 340(3) provides:

- H (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2)—
- I (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
- (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interests acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[21] The authorities seemed to suggest that this sub-section creates a deferred indefeasibility. One does not acquire indefeasibility immediately upon registration of the requisite instruments. His Lordship Wan Yahya bin Pawan Teh in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 at p 309, stated:

A purchaser of land might fail to obtain a good title in two distinct ways. Firstly, if the title of the vendor is bad. Secondly even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule is that no person can give a better title than he had — *nemo dat quod non-habet*. There are however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of our National Land Code 1965 where a bona fide purchaser of value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility — see *Gibbs v Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside.

[22] Meanwhile, His Lordship Gopal Sri Ram JCA in *Abu Bakar Ismail & Anor v Ismail Husin & Ors and other appeal* said:

Note that sub-s (3) in paras (c) and (b) employs the word 'subsequently'. What it means is this. If a registered proprietor gets on the register by any of the means set out in s 340(2), and if he or she to use the expression housed in the Code — subsequently — transfers his or her land to another, the title of that other is also defeasible unless he or she is a purchaser in good faith and for valuable consideration. Also protected are persons who take from such a purchaser. I may add that the proof that one is a purchaser in good faith and for valuable consideration lies on the person asserting it ...

[23] Additionally, His Lordship Raus Sharif JCA in *Au Meng Nam & Anor v Ung Yak Chew & Ors* at p 153, opined:

[34] Taking the cue from the above observation of Abdul Hamid Mohamad FCJ, it is my respectful view that the Federal Court should review its decision in *Adorna Properties Sdn Bhd*. To me, by virtue of s 340(2)(b) of the Code, the title of *Adorna Properties* was not indefeasible as the registration was obtained by forgery. Section 340(3) does not apply to s 340(2). The proviso states 'Provided that in this subsection' and this sub-section refers to s 340(3) and not s 340(2). Section 340(3)(a) refers to 'to whom it may subsequently be

A transferred' which means that the intended purchaser is the subsequent purchaser and not the immediate purchaser.

[35] Similarly, in the instant case, the title of the first defendant is defeasible as the registration was obtained by forgery. The first
B respondent was the immediate purchaser and not a subsequent purchaser. Section 340(3) has no application as it refers to subsequent purchaser and not the immediate purchaser. Thus, the plaintiffs would have succeeded in this appeal if not for the Federal Court interpretation of s 340 of the Code in *Adorna Properties Sdn Bhd*. But
C for the reasons given earlier, I am not ready to ignore or disregard the Federal Court's decision in *Adorna Properties Sdn Bhd*.

[24] In the instant case before me, the plaintiff as earlier stated, failed to
D prove its bona fide in the charge transaction. Equally the registration of the charge instrument was obtained by forgery of the third defendant's thumbprints and no duty was imposed on the defendants, in particular the third defendant, to prove that the plaintiff was a party or privy to the forgery. Applying the principles emanating from the authorities enumerated above, it
E is thus clear that the interest acquired by the plaintiff over the said land through the registration of the charge instrument over the same was not indefeasible under s 340(2)(b) of the NLC on account that the registration was obtained by forgery. Additionally, of equal importance the plaintiff was not a subsequent purchaser but an immediate purchaser. Hence s 340(3) of
F the NLC is of no assistance to the plaintiff for the exception to the proviso is only applicable to subsequent bona fide purchaser for valuable consideration. This proviso has no application in situations created or envisaged under s 340(2) of the NLC. This is grounded upon the premise, as the authorities suggested, that the words 'Provided that in this sub-section ...'
G refers exclusively to the sub-section under s 340(3) to the total exclusion of s 340(2). As the plaintiff is not a subsequent purchaser, the protection afforded by s 340(3) does not apparently apply. In the event it follows through that the proviso does not also apply. In other words, the plaintiff's interest over the said land is simply defeasible and thus liable to be set aside.

H [25] As regards to the constraint posited by *Adorna Properties Sdn Bhd*, I would very humbly and most respectfully adopt the approach taken by His Lordship Raus Sharif JCA in *Au Meng Nam & Anor v Ung Yak Chew & Ors* as evinced in paras 31, 32, 33 and 34 (at pp 548 and 549) of His Lordship's
I judgment.

[26] For all the reasons enumerated in the preceding paragraphs, it is my findings that the defendants has successfully established the existence of cause to the contrary to resist the order of sale of their land pursuant to the charge

sought by the plaintiff within s 256(3) of the NLC. In this regard His Lordship Gopal Sri Ram JCA in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 at p 82 said:

In our judgment cause to the contrary within s 256(3) may be established only in three category of cases. First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the Code establishes cause to the contrary.

That section provides ...

[27] At p 83, His Lordship continued:

In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-s (2) and 4(b) above will be held to have established cause to the contrary under s 256(3).

[28] On the facts and evidence as shown above there can be no doubt that the defendants in the case presently before me has shown that the plaintiff's interest in respect of the said land is defeasible. On account of the same I thus dismissed the plaintiff's application vide encl 2 with cost.

[29] Of course there were other unsatisfactory features relating to the plaintiff's application for the said order for sale. The notice in Form 16D dated 11 April 1998 according to the plaintiff, was issued for an earlier foreclosure proceeding in Originating Summons No 57-24-1879 of 1989 in Kuala Lumpur High Court. This suit was dismissed with cost. However the plaintiff did not disclose the circumstances surrounding its dismissal nor the reasons for the dismissal therein for reasons best known to them. If it was based on merits, there could well have been an issue of resjudicate here.

[30] No further action was taken until a new statutory notice was issued dated 23 December 2003. However para 9 of encl 3 states that a Form 16D dated 21 October 2003 was sent. But p 80 of encl 3 merely exhibited a *private and confidential letter* together with its purported enclosure dated 23 December 2003. This defect was not explained nor corrected. Additionally para 8 of encl 3 states that a notice of demand was sent dated 13 October 2003. But p 73 of encl 3 exhibited a letter dated 9 December 2003. Which is which now? Enclosure 19 of plaintiff's affidavit attempted to rectify the mistakes. But it was affirmed by a different officer. Paragraph 7(ii) of encl 3 states that the repayment sum stands at RM 46,744.16. However at para 8 of encl 32, the plaintiff admitted the sum was wrong. The new figure was RM55,711.20. Again the corrective affidavit was affirmed by a different officer. In this respect I am with the submission of learned counsel for the

A defendants that an affidavit in support is the crux of the application and that the sworn statement of facts stated therein cannot be changed at the whims and fancies of the plaintiff without cogent enough reasons.

B [31] There is a lapse of 15 years between the sending of the statutory notice and the filing of the originating summons herein. The amount disbursed was only RM100,000 in 1987. Such delay in taking action since the default in 1987 which was about 17 years, resulted in the interest to soar up to 500% on top of the principal. The plaintiff offered a number of reasons to account for the delay, the main one being the restructuring process of the plaintiff bank. But in my view however valid the reasons are, it should not work to the disadvantage/detriment of the defendants. It only goes to show that the plaintiff is circumventing its duty to be diligent. In such event I find it to be thoroughly unconscionable to enforce the charge.

D [32] For purposes of completeness, for all the reasons given above I dismissed the plaintiff's application for an order for sale with costs.

Application dismissed with costs.

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Reported by K Nesan

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